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* IN THE HIGH COURT OF DELHI

\+ OMP No. 210/2001

Judgment reserved on : 04.05.2006
% Date of decision : 10.05.2006

M/s N.P.C.C. ... ... PETITIONER
through :Mr.A.K.Singh with
Mr.A.A.Aron &
Mr.R.K.Tiwari,
Advocates.

- V E R S U S -

M/s Rajdhani Builders... ... RESPONDENT
through :Mr.Ajay Majithia, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL (Oral)

1. The respondent-contractor was awarded the construction work at the PETS complex, Faridabad, Haryana by the petitioner in pursuance of the agreement dated 26.04.1991. The stipulated date of completion of work was 17.06.1992, but the work was actually completed on 21.08.1993 with the delay of about one year and two months. The terms and

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conditions agreed to between the parties contained arbitration clause and since disputes arose between the parties, the matter was referred to arbitration. The earlier arbitrator passed away and subsequently Mr.M.M.Kapoor_was appointed as the sole arbitrator who made and published his award dated 30.04.2001. The petitioner aggrieved by the same has filed the present objections under Section 34 of the Arbitration and Conciliation Act, 1996 (herein after referred to as the 'said Act')

2. Learned counsel for the petitioner at the inception of the hearing drew the attention of this court to the judgment in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd., AIR 2003 SC 2629 to contend that the objections canvassed by the petitioner fall within the scope of scrutiny under Section 34 (2) of the said Act. Learned counsel submitted that the jurisdiction or powers of the arbitral tribunal is prescribed under the Act and if the award is de hors of the said provisions, it would be on the face of it illegal. Further if the arbitral tribunal has not followed the mandatory procedure prescribed under section 24, 28 or 31(3) of the said Act which affects the rights of the parties, the award cannot be sustained and the court has to intervene as it is settled principle of law that the procedural law

cannot fail to provide relief when substantive law gives the right.

3. The apex court interpreted the term " Public Policy of India" used in the provisions of Section 34(2) of the Act in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable. Another aspect considered by the apex court was that the award cannot be in violation of the contractual terms agreed to between the parties as thereby it would violate section 28(3) of the Act. A reference was also made by the apex court to the judgment in M/s Alopi Prasad v. Unon of India; AIR 1960 Supreme Court 588; which examined the scope of scrutiny by the court under Section 30 & 33 of the Indian Arbitration Act, 1940. One of the aspects which was to be considered as an error apparent on the face of the award was where the award was founded on some legal proposition which was erroneous. However if a specific question was submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face so as to permit it being set aside.

4. The Supreme Court concluded that an award contrary to substantive provisions of law or provisions of the

said Act or against the terms of the contract would be patently illegal and if it affects the rights of the parties is open to interference by the court under Section 34(2) of the said Act. The word "Public Policy of India" was given a wider meaning to connote some matter which concerns public good and public interest. Thus an award patently in violation of statutory provisions cannot be said to be in public interest.

5. An award could be set aside if it is contrary to a fundamental policy of Indian law; b) interest of India; c) Justice or morality; d) in addition, if it is patently illegal. It was however clarified that an illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against public policy. An award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. These aspects have also been elucidated in the subsequent judgments of the apex court in Civil Appeal No.3134 of 2002 titled '*Hindustan Zinc Ltd. v. Friends Coal Carbonisation*' decided on 04.04.2006.

6. The aforesaid aspects have been discussed because the scope of scrutiny under Section 34(2) of the said Act has undoubtedly been expanded in view of the judgments of the Supreme Court.

7. Learned counsel for the petitioner referred to the

findings arrived at by the arbitrator in respect of claim no.4 which dealt with the extra amount/expenditure incurred by the contractor on account of escalation as per provisions of the contract. The arbitrator has noticed that there was delay of almost fourteen months in the completion of the contract. In terms of Clauses 44 & 45 of the contract escalation was payable for such period for which the contract was validly extended under the provision 12.4 of the contract. In the present case, no such extension had been granted though the respondent had applied for time extension vide letter dated 15.06.1992. The petitioner informed the respondent vide letter dated 20.06.1992 that the work should be first completed and the decision on the question of time extension would be taken thereafter. The indices of price escalation were frozen as on January, 1992 for the works executed thereafter and the reason given by the concerned engineer of the petitioner was that the same was on account of instruction from PETS, owners of the work.

8. The arbitrator has found that extension of time ought to have been granted on the basis of the material placed on record especially when there was increase in scope of work, extra items and various hindrances as set out by the respondent.

9. Learned counsel for the petitioner contended that this finding of the arbitrator was contrary to the mandate of clause 12.4 which reads as under:

> " In any such case the authority mentioned in General conditions of the contract may give a fair and reasonable extension of time for completion of the work. Such extension shall be communicated to the Contractor by the Engineer in Charge in writing, within three months of the date of receipt of such request by the Engineer in Charge. However, such extension shall not entitle the contractor to any claim for money."

10. A reading of the afore clause shows that extension of time is liable to be granted in an appropriate case in terms of the said clause. No claim is maintainable on account of such extension. However where there is extra work and extra items to be completed and the petitioner itself is found at fault, it cannot be said that the petitioner is remedyless to be compensated for its faults. It cannot be said that the petitioner would be in breach of its obligations and yet the respondent cannot be monetarily compensated for the same.

11. Learned counsel for the petitioner also in this behalf referred to clause 10 of the conditions of contract which reads as under:

> " **Deviations/Variations Extent & Pricing**:- The Engineer in Charge shall have power (i) to make alterations in, commissions from, additions to, or

substitutions for the original specifications, drawings, designs and instructions that may appear to him to be necessary or advisable during the progress of the work, and (ii) to omit apart of the works in case of non-availability of a portion of the site or for any other reasons, and the Contractor shall be bound to carry out the Works in accordance with any instructions given to him in writing signed by the Engineer in Charge and such alterations, omissions, additions or substitution shall form part of the contract as if originally provided therein and any altered, additional or substituted work which the contractor may be directed to do in the manner above specified as part of the Works, shall be carried out by the Contractor on the same conditions in all respects including price on which he agreed to do the main work. Any alterations, omissions additions or substitutions which radically change the original nature of the contract shall be ordered by the Engineer in Charge as a deviation and in the opinion of the contract changes the original nature of the Contract, he shall nevertheless carry it out and the disagreement if any as to the nature of the work and the rate to be paid therefore shall be resolved in accordance with the following provisions in their respective Order."

12. Learned counsel contended that the deviations, variations have to be performed by the contractor on the same conditions in all respects including prices on which he agreed to do the main work. However this is not a case where the deviations could be performed within the same period of time as they were really in the nature of extra work assigned. If the extra work has to result in extension of time period of contract, it

cannot be said that the contractor would continue to perform the extra work without escalation on the basis of indices. The arbitrator has given extra time for completion of the contract in proportion to the increase in the value of the contract items. Another factor taken note of by the arbitrator, in my considered view rightly so, is that even though the contractor was asked to perform the extra work and submit rate analysis, advance for the same was refused even though required to be so given. The contract required that 75 per cent of the cost of any materials which according to the engineer in charge is reasonably required was to be paid and the advance adjusted as and when the materials are utilised in the works. This is apparent from clause 42 (b) of the heading "Payment on Account" at page G-34 of the Condition of contract. The refusal of the petitioner to pay the secured advance would naturally affect the cash flow of the respondent this was one more factor taken note of by the arbitrator.

13. I am thus unable to come to the conclusion that there is any such patently illegality in the award of this claim which runs contrary to the terms and conditions of the contract while awarding the amount of Rs 3,06,033/-.

14. Claim no(5) is in respect of demands due on account of

work executed/done at the site, but not measured by the respondent. Sub head claim 5(d) deals with the work not fully paid and illegal recoveries made in the final bill on account of liquidated damages, alleged defects and other items. The liquidated damages were levied as per clause 29 of the terms and conditions which provides compensation for delay. Damages were also levied under clause 38 for defects or imperfections and rectifications thereof. A reading of clause 38 shows that the principal requirement of invocation of this clause is that a notice must be sent by engineer in Charge for the contractor to rectify or remove and reconstruct the work and it is on his failure to do so within the period specified that the work can be got done at the risk and expense of the contractor.

15. Learned counsel for the petitioner submitted that the amount was directed to be refunded since it was held that the petitioner ought to have granted extension of time to the respondent. However Clause 42 provides that all items having financial value shall be entered in the measurement book and the measurements shall be taken jointly by the engineer in charge and by the contractor. It is only in case the contractor fails to attend or send an authorised representative for measurement can the measurements be taken by the

engineer in charge unilaterally. In case of objection by the contractor, the note to that effect has to be put in measurement to be given. The decision of the accepting authority on any dispute or difference or any interpretation is to be final and binding on both the parties and shall be beyond the scope of the settlement of disputes by arbitration in respect of contract items, substituted items, extra items and variations. It was thus contended that the award under claim 5(d) was not arbitrable.

16. A perusal of the award in respect of the said claim 5(d) shows that the copy of the final bill which was duly passed by the accounts department in which all the measurement book references are given on the face of the bill was accepted. It is in view thereof that there is force in the contention of the learned counsel for the respondent that no sum has been awarded on account of non measurement of any item but what has been awarded is on account of withholding of the contractor's amount, not giving advance to the respondent and affecting the cash flow and causing delay.

17. I am also unable to accept the plea of the learned counsel for the petitioner that there is any double benefit given to the respondent. The question of

escalation is linked to the extension of time. The extension of time itself implies that the petitioner could not have imposed liquidated damages and thus that amount has been directed to be refunded back. The refund of the liquidated damages and the escalation cannot thus be said to be duplication of the same amount.

18. The arbitrator has proceeded on the basis of the final bill approved by the accounts department of the petitioner. There is no question of drawing any adverse inference against the respondent on the alleged ground that the respondent had not submitted the final bill as the final bill is available as approved by the petitioner.

19. Learned counsel for the petitioner also sought to contend that no interest was payable on the security deposit as the security deposit is liable to be refunded only on completion of the work. Thus while awarding interest, the amount of security deposit should have been excluded.

20. I am unable to accept this contention for the reason that once the fault was found on the part of the petitioner and the security deposit was unreasonably detained, the respondent has to be compensated with interest. Clause 9.3 would have no application for

unreasonable detention of security deposit. The said clause reads as under:

> "No interest shall be payable to the contractor against the Security Deposit furnished/recovered from the contractor, by the Corporation."

21. The last aspect raised by learned counsel for the petitioner was in respect of interest. It may be noticed that the award is only for a sum of Rs 7,63,114/- but interest has accumulated on account of a long period involved. The rate of interest granted is at 10 per cent which is certainly reasonable. Merely because long time period has passed will not mean that the respondent ought not to be compensated with interest.

22. In respect of interest the arbitrator has further directed that future interest shall be paid at 18 per cent per annum if the award amount and the interest amount are not paid within 30 days from the date of award. This 18 per cent interest is to be calculated on the principal amount of Rs 10,88,569/-. Since the objections were pending, I am of the considered view that the interest rate should remain as 10 per cent per annum even for the further period subject to the condition that the total amount is now paid within 30 days from today failing which the rate of interest of 18 per cent would operate.

23. The petition stands dismissed with the aforesaid

directions. The respondent shall also be entitled to costs of the present proceedings quantified at Rs 7,500/-.

May 10, 2006
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SANJAY KISHAN KAUL, J.